

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIO AILON

Claimant

VS.

CARGILL MEAT SOLUTIONS CORP.

Self-Insured Respondent

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Docket No. **1,025,559**

ORDER

Claimant requested review of the May 14, 2008 Award by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on August 5, 2008.

APPEARANCES

Stanley R. Ausemus of Emporia, Kansas, appeared for the claimant. D. Shane Bangert of Dodge City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained a 5 percent permanent partial functional impairment to each shoulder based upon the court-ordered independent medical examination of Dr. Terrence Pratt.

Claimant requests review of whether he sustained an 8 percent functional impairment to each shoulder based upon Dr. Murati's rating. Claimant further argues that respondent should not receive a credit for a preexisting condition when claimant was never rated and was asymptomatic at the time of his employment.

Respondent argues the ALJ's Award should be affirmed.

The sole issue for Board determination is the percentage of permanent functional impairment claimant suffered to each shoulder as the result of his accidental injuries.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed that claimant suffered repetitive injuries to his shoulders arising out of and in the course of his employment while boning ribs for respondent. He testified the pain came on gradually and that he cannot raise his arms above shoulder level without experiencing a popping sensation and pain. Conservative medical treatment was given including physical therapy and cortisone injections.

Before claimant began employment with respondent he was given a pre-employment physical. As a result of problems discovered in the physical he was sent to Dr. J. Raymundo Villanueva for examination and evaluation on June 12, 2003. Dr. Villanueva diagnosed claimant with lots of crepitus on both shoulders with activities at or above the shoulder level which is more noticeable with rotations. The doctor's note indicates that claimant be "placed in a position in which he is not allowed to do repetitive use of the upper extremities at or above the shoulder level right and left."¹

Claimant then began his job boning ribs for respondent. Claimant agreed that the job did not require him to perform work at or above the shoulder level. It should be noted that claimant had hernia surgery. Claimant testified that after his hernia surgery he started performing his job differently and he began to have problems with his shoulders.

On February 12, 2007, claimant was examined and evaluated by Dr. John P. Estivo due to bilateral shoulder pain. The doctor diagnosed claimant as having mild right and left rotator cuff tendinitis. Dr. Estivo opined claimant was at maximum medical improvement and released him to return to work without permanent restrictions. Dr. Estivo further opined claimant suffered a 0 percent permanent impairment to his shoulders.

Dr. Pedro A. Murati examined claimant on April 17, 2007, at the request of claimant's attorney. Dr. Murati performed a physical examination of claimant and diagnosed claimant with bilateral carpal tunnel syndrome, referring pain to the shoulders, bilateral rotator cuff sprain versus tear, and myofascial pain syndrome affecting the bilateral shoulder girdles extending into the cervical paraspinals.

¹ Stipulation filed March 28, 2008.

Based upon the *AMA Guides*², the doctor concluded claimant had a 10 percent right upper extremity impairment for right carpal tunnel syndrome and 8 percent to the right upper extremity for severe AC crepitus. Using the combine values chart, these right upper extremity impairments result in a 17 percent which convert to a 10 percent whole person impairment. Dr. Murati rated claimant's left carpal tunnel syndrome at 10 percent and left shoulder AC crepitus at 8 percent. Again, using the combine values chart, these left upper extremity impairments result in a 17 percent which convert to a 10 percent whole person impairment. The doctor imposed permanent restrictions that in an 8-hour day the claimant should engage in no lift/carry/push/pull greater than 20 pounds frequently and only 30 pounds occasionally.

On October 12, 2007, the ALJ ordered an independent medical examination of claimant by Dr. Terrence Pratt to determine claimant's rating and restrictions. Upon a physical examination, Dr. Pratt found claimant had bilateral upper parascapular palpable tenderness without involvement of the cervical paraspinous muscles. He further found palpable tenderness overlying the anterior aspects of both shoulders and that claimant had consistent AC crepitus even with passive movements bilaterally. Dr. Pratt diagnosed claimant as having bilateral shoulder syndrome with crepitus. The doctor placed restrictions on claimant of performing no frequent overhead activities with the bilateral extremities; limited overhead lifting to occasional and maximal 15 pounds, otherwise limit lifting to a maximum of 25 pounds; and limited pushing and pulling to a maximum of 50 pounds. Based upon the *AMA Guides*, Dr. Pratt rated claimant's bilateral shoulder involvement at 8 percent to each upper extremity at the shoulder. The doctor further noted that claimant had pre-existing crepitus in both shoulders and had been provided restrictions, accordingly, the doctor concluded that 5 percent of the permanency in each of claimant's shoulders was due to claimant's accidental injury on September 12, 2005.

In *Casco*³, the Kansas Supreme Court considered whether an individual who sustained bilateral, parallel, non-simultaneous injuries to his shoulders was entitled to compensation based upon two separate scheduled injuries, under K.S.A. 44-510d, or as a unscheduled whole body injury, under K.S.A. 44-510e(a). After examining the applicable statutes and the relevant case law, the *Casco* Court provided certain rules. They are as follows:

Scheduled injuries are the general rule and nonscheduled injuries are the exception. K.S.A. 44-510d calculates the award based on a schedule of disabilities. If an injury is on the schedule, the amount of compensation is to be in accordance with K.S.A. 44-510d.

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007).

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof, the calculation of the claimant's compensation begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c.

When the workers compensation claimant has a loss of both eyes, both hands, both arms, both feet, both legs, or any combination thereof and the presumption of permanent total disability is rebutted with evidence that the claimant is capable of engaging in some type of substantial and gainful employment, the claimant's award must be calculated as a permanent partial disability in accordance with the K.S.A. 44-510d.

K.S.A. 44-510e permanent partial general disability is the exception to utilizing 44-510d in calculating a claimant's award. K.S.A. 44-510e applies only when the claimant's injury is not included on the schedule of injuries.⁴

In any combination scheduled injuries are now the rule, while nonscheduled injuries are the exception.⁵ There is a rebuttable presumption that the claimant is permanently and totally disabled. That presumption can be rebutted by evidence that the claimant is capable of engaging in some type of substantial gainful employment.⁶

In this case there is no contention that claimant is permanently and totally disabled. Dr. Estivo provided no restrictions and although both Drs. Murati and Pratt provided restrictions neither opined that claimant was permanently disabled. Nor did claimant allege that he was permanently and totally disabled. Consequently, claimant's recovery is limited and he is not entitled to permanent total disability benefits under K.S.A. 44-510c(a)(2).

K.S.A. 44-510d(a)(23) provides:

Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

⁴ *Id.*, Syl. ¶¶ 7-10.

⁵ *Id.*, Syl. ¶ 7; *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

⁶ *Casco*, 283 Kan. 508 Syl. ¶ 9.

The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.⁷ It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony with the testimony of the claimant and others in making a determination on the issue of disability. The trier of fact must make the ultimate decision as to the nature and extent of injury and is not bound by the medical evidence presented.⁸

Here, claimant sustained simultaneous bilateral and parallel injuries to his upper extremities. Both of those extremities are listed in K.S.A. 44-510d. And there is no evidence that as a result of his upper extremity injuries he is permanently and totally disabled. Thus, under the *Casco* analysis, claimant is entitled to recovery based upon *two separate scheduled injuries*.

Based upon the *AMA Guides*, both Drs. Pratt and Murati concluded claimant suffered an 8 percent functional impairment to each shoulder. Dr. Estivo concluded claimant had suffered no permanent impairment. Although Dr. Murati found additional impairment due to carpal tunnel syndrome it is significant to note that claimant only complained of shoulder pain and now does not allege entitlement to additional permanency for those ratings. However, Dr. Pratt further found claimant had pre-existing impairment in both shoulders and reduced his impairment attributable to the accident to 5 percent to each shoulder.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.⁹

Consequently, by definition the Act requires that preexisting functional impairment be established by competent medical evidence and ratable under the appropriate edition of the *AMA Guides*, if the condition is addressed by those *Guides*. The Act neither requires that the functional impairment be actually rated before the subsequent work-related accident nor that the worker had been given work restrictions for the preexisting condition. Instead, the Act only requires that the preexisting condition must have actually constituted a ratable functional impairment.

⁷ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

⁸ *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁹ K.S.A. 44-501(c) (Furse 2000).

In this case the claimant had a pre-employment physical and it was determined that he suffered significant crepitus in both shoulders. Claimant was provided restrictions by Dr. Villanueva against the use of his upper extremities at or above the shoulder level on the right and left. He was provided a job with respondent that he agreed did not violate those restrictions. Dr. Pratt was aware of these pre-existing findings and restrictions and concluded that claimant had a pre-existing impairment which reduced his impairment ratings to the shoulders as a result of his current injuries to 5 percent.

The ALJ noted that it was clear from the evidence that claimant had pre-existing shoulder crepitus and was given restrictions for this condition before he began his employment with respondent. The ALJ further noted that Dr. Pratt had Dr. Villanueva's medical records regarding the pre-existing crepitus and was more informed than the other doctors. Accordingly, the ALJ concluded that Dr. Pratt's opinion was the most persuasive and adopted his 5 percent permanent partial functional impairment rating to each shoulder. The Board agrees and affirms.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated May 14, 2008, is affirmed.

IT IS SO ORDERED.

Dated this 30th day of September 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
D. Shane Bangerter, Attorney for Self-Insured Respondent
Pamela J. Fuller, Administrative Law Judge